INSPECTOR YUSOF HJ OTHMAN & ORS

v.

KWAN HUNG CHEONG

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ZULKEFLI MAKINUDIN FCJ
RAUS SHARIF FCJ
[CIVIL APPEAL NO: 01(F)-7-2011(S)]
25 JULY 2011

CRIMINAL PROCEDURE: *Bail - Release on - Release on bail under s. 388 CPC following release from detention under s. 117 of same - Whether lawful for police to issue bail following release from detention - No clear order from court that application for release on bail was granted - Whether application deemed rejected - Whether police officer could exercise power under s. 388 CPC after rejection - Police investigations not continued into case to justify release on bail - Whether abuse of power - Whether art. 5(1) Federal Constitution infringed giving rise to claim in damages - Penal Code, s. 454, Federal Constitution, art. 5(1)*

POLICE: *Powers - Powers to issue bail - Whether abused - Criminal Procedure Code, ss. 117, 388 - Penal Code, s. 454 - Federal Constitution, art. 5(1)*

The plaintiff and one Mr Lai were arrested without a warrant on 3 January 2000 on suspicion of committing an offence of house-trespass or house-breaking under s. 454 of the Penal Code. The arrest was based on a complaint lodged by the plaintiff's tenant. Both suspects were brought before the magistrate's court on 4 January 2000 wherein a remand order was issued against them for three days under s. 117 of the Criminal Procedure Code ('CPC'). On 6 January 2000, the Chief Inspector applied to the magistrate for an order to release the suspects on police bail pending completion of police investigations. The magistrate ordered both suspects to be released but no mention was made as to whether the application for their release on police bail was granted. On the same day of the magistrate's order, the suspects were brought to the police station and made to sign separate bail bonds issued by the 1st defendant for an undeposited sum of RM10,000 in two sureties each. Under the police bail bond, the plaintiff had to appear before the 1st defendant at the police station on

28 January 2000. When the plaintiff appeared at the police station on the said date, the 1st defendant endorsed the bail form and extended the bail until 28 March 2000. That process was repeated at monthly intervals right through 5 October 2000. In the interim period, on 11 May 2000, the plaintiff had written to the Federal Attorney General's Chambers enquiring about the decision concerning the complaint against him. That was followed by letters of reminder dated 26 June 2000, 15 July 2000 and 1 September 2000. On 11 October 2000 the Federal Attorney General's Chambers finally wrote to the plaintiff informing him that a decision was made to close the investigation on the case and to withdraw the police bail against him. The plaintiff then filed this action against the defendants and by way of an application on a point of law under O. 14 A Rules of the High Court 1980, raised the following questions of law for determination: (1) whether it was lawful for the police to release a suspect on police bail under s. 388 CPC after the said suspect was released from a remand order by a magistrate under s. 117 of the same; (2) whether it was lawful to impose a condition on the bail that the suspect had to appear and report at a police station on a fixed date and whether the said condition could be extended from time to time for so long as the case against the suspect was still under police investigation; and (3) if either or both the police bail described above was unlawful, whether that amounted to a deprivation of the suspect's personal liberty in contravention of art. 5(1) of the Federal Constitution ('Constitution') giving rise to a claim in damages. The trial judge decided all three questions in favour of the plaintiff and held that the police bail deprived the plaintiff's personal liberty and contravened art. 5(1) of the Constitution. The defendants were ordered to pay compensation jointly and severally to the plaintiff in the amount of RM3,000. The Court of Appeal affirmed the High Court decision. Hence the appeal to the Federal Court on the same three questions.

Held (dismissing the appeal)
Per Raus Sharif FCJ delivering the judgment of the court:

(1) The magistrate's power under s. 117 CPC was either to detain the accused or to refuse the detention of the accused. If the magistrate refused to grant the detention of the accused or to further extend the detention of the accused, the police had no choice but to release the accused. The release of the

A accused under s. 117 could not be equated as an order to acquit and discharge the accused from the criminal accusation. (para 23)

(2) The magistrate gave no indication as to whether the B application to release the suspects on police bail was allowed or otherwise. Instead the magistrate recorded "Both suspects to be released". The release order of the suspects pertained to their detention under s. 117 CPC. They could not be said to be acquitted and discharged of the criminal accusation and C the police could not be prevented from continuing with the investigation against them. (paras 24 & 25)

(3) Section 388 CPC assisted the police by empowering the police to release the accused on police bail while investigations were still in progress. Section 388 made no provision that the D power of the police officer to release an accused of a non-bailable offence under s. 388(1) was only exercisable before the accused was produced before a magistrate under s. 117 CPC. Neither did such a provision exist under s. 117. It followed that it was lawful for the police to issue a police bail E under s. 388(1) after an accused was released by a magistrate following detention under s. 117. (paras 26 & 27)

(4) The police having the power to grant a police bail must necessarily have the power to impose the conditions in the bail F bond. Section 390 CPC clearly provided that the power to release a person on bail was given to the court and the police officer of a police station. Therefore if an accused was admitted to bail by an officer of a police station, the officer could require him to execute a bond with one or more sureties G binding him to appear before the officer at the police station from time to time. (paras 28 & 29)

(5) The prosecuting officer's application before the magistrate court was not for further detention under s. 117 CPC but for H an order that the suspects be released on police bail pending completion of police investigations. As the magistrate did not record whether the application was granted, the application was assumed rejected. The prosecuting officer could not assume that the application was granted. The confusion was I not due to the fault of the plaintiff and therefore the benefit of the confusion must be given to the plaintiff, namely, that

application was rejected. Once the application was rejected, the 1st defendant could no longer issue the police bail under s. 388(1) CPC. By making the plaintiff sign a police bail bond and impose conditions thereon, the act was in defiance of the court's order and was unlawful. (paras 34 & 36)

(6) Although the police have powers to impose bail under s. 388 CPC even if the accused had been released from remand under s. 117 of the same, the power must not be abused where the accused, as in the present case, was repeatedly required to present himself at the police station only to have his bail form endorsed for him to appear on another date. The facts showed that the police did not honestly continue with the investigations into the case which was an abuse of power. The plaintiff was deprived of his personal liberty in contravention of art. 5(1) of the Constitution which gave rise to a claim in damages. (paras 37 & 38)

[Questions 1 & 2 answered in the positive; Question 3 was answered for the reasons given in Held 5 and Held 6.]

Bahasa Malaysia *Translation Of Headnotes*

Plaintif dan seorang Mr Lai telah ditangkap tanpa waran pada 3 Januari 2000 kerana disyaki melakukan kesalahan menceroboh atau pecah rumah di bawah s. 454 Kanun Keseksaan. Tangkapan dibuat berdasarkan satu aduan yang dibuat oleh penyewa rumah plaintif. Kedua-dua suspek kemudian di bawah ke mahkamah majistret pada 4 Januari 2000 di mana satu perintah menahan dikeluarkan terhadap mereka untuk tempoh tiga hari di bawah s. 117 Kanun Tatacara Jenayah ('KTJ'). Pada 6 Januari 2000, Ketua Inspektor telah memohon kepada majistret untuk membebaskan kedua-dua suspek dengan jaminan polis sementara menunggu siasatan selesai. Majistret telah memerintahkan kedua-dua suspek dibebaskan, tetapi tidak menyebut sama ada permohonan untuk membebaskan mereka atas jaminan polis dibenarkan atau sebaliknya. Pada hari yang sama perintah Majistret dibuat, kedua-dua suspek dibawa ke balai polis and diarah untuk menandatangani bon jaminan berasingan yang dikeluarkan oleh defendan pertama, dengan setiap satunya untuk jumlah RM10,000 yang tidak didepositkan dengan dua penjamin. Di bawah bon jaminan polis, plaintif perlu menghadirkan diri di hadapan defendan pertama di balai polis tersebut pada 28 Januari 2000. Apabila

plaintif menghadirkan diri di balai polis pada tarikh tersebut, defendan pertama telah mengindors atas borang jaminan sekaligus melanjutkan jaminan hingga 28 Mac 2000. Proses tersebut diulangi pada setiap bulan sehinggalah ke 5 Oktober 2000. Sementara itu, pada 11 Mei 2000, plaintif telah menulis kepada Jabatan Peguam Negara Persekutuan menanyakan tentang keputusan mengenai aduan yang dibuat terhadapnya. Surat tersebut diikuti dengan surat peringatan bertarikh 26 Jun 2000, 15 Julai 2000 dan 1 September 2000. Pada 11 Oktober 2000, Jabatan Peguam Negara Persekutuan akhirnya menulis kepada plaintif memberitahunya bahawa keputusan telah dibuat bagi menutup penyiasatan kes tersebut dan menarik balik jaminan polis terhadapnya. Berikutnya, plaintif memfail tindakan semasa terhadap defendan-defendan dan, melalui permohonan atas persoalan undang-undang di bawah A. 14A Kaedah-Kaedah Mahkamah Tinggi 1980, membangkitkan persoalan undang-undang berikut untuk pemutusan, iaitu: (1) sama ada ianya sah bagi polis untuk melepaskan seorang suspek di bawah jaminan polis di bawah s. 388 KTJ selepas suspek dilepaskan dari perintah tahanan yang dibuat oleh majistret di bawah s. 117 KTJ; (2) sama ada ianya sah untuk mengenakan syarat pada jaminan bahawa suspek harus hadir dan melaporkan diri di balai polis pada tarikh-tarikh tertentu, dan sama ada syarat tersebut boleh dilanjutkan dari masa ke semasa selagi mana kes terhadap suspek masih berada dalam penyiasatan polis; dan (3) jika sekiranya salah satu atau kedua-dua jaminan polis di atas tak sah, sama ada ia merupakan suatu penafian kepada hak kebebasan diri suspek yang melanggari fasal 5(1) Perlembagaan Persekutuan ('Perlembagaan') yang boleh membangkitkan suatu tuntutan gantirugi. Hakim bicara memutuskan ketiga-tiga persoalan dengan memihak kepada plaintif sambil menegaskan bahawa jaminan polis telah menafikan plaintif kebebasan dirinya secara yang melanggari fasal 5(1) Perlembagaan. Defendan-defendan telah secara berasingan dan bersesama diperintah untuk membayar gantirugi kepada plaintif berjumlah RM3000. Mahkamah Rayuan telah mengesahkan keputusan Mahkamah Tinggi sekaligus membangkitkan rayuan ke Mahkamah Persekutuan di sini atas persoalan-persoalan yang sama.

Diputuskan (menolak rayuan)
Oleh Raus Sharif HMP menyampaikan penghakiman mahkamah:

(1) Kuasa majistret di bawah s. 117 KTJ adalah sama ada untuk menahan atau tidak menahan tertuduh. Jika majistret enggan memerintahkan penahanan tertuduh atau enggan melanjutkan penahanannya, pihak polis tidak mempunyai pilihan melainkan mestilah melepaskan tertuduh tersebut. Pelepasan tertuduh di bawah s. 117 tidak boleh disamakan dengan perintah untuk membebas dan melepaskan seorang tertuduh dari dakwaan jenayah.

(2) Majistret tidak memberi apa-apa petanda sama ada permohonan untuk melepaskan suspek atas jaminan polis dibenarkan atau sebaliknya. Majistret sebaliknya merekodkan "kedua-dua suspek hendaklah dilepaskan". Perintah pelepasan suspek-suspek adalah berkaitan penahanan mereka di bawah s. 117 KTJ. Mereka tidak boleh dikatakan telah dibebas dan dilepaskan dari dakwaan jenayah dan pihak polis tidak boleh dihalang dari meneruskan penyiasatan terhadap mereka.

(3) Seksyen 388 KTJ membantu pihak polis dengan memberi kuasa kepada mereka untuk melepaskan seorang tertuduh dengan jaminan polis sementara penyiasatan masih berjalan. Seksyen 388 tidak memperuntukkan bahawa kuasa polis untuk melepaskan seorang tertuduh bagi kesalahan tidak boleh jamin di bawah s. 388(1) hanya boleh dilaksanakan sebelum tertuduh dibawa ke hadapan majistret di bawah s. 117 KTJ. Peruntukan sebegitu juga tidak wujud di bawah s. 117. Ianya mengikut bahawa adalah sah bagi pihak polis untuk mengeluarkan bon jaminan polis di bawah s. 388(1) selepas tertuduh dilepaskan oleh majistret ekoran penahanan di bawah s. 117.

(4) Dengan pihak polis mempunyai kuasa untuk memberikan jaminan polis, maka mereka semestinya mempunyai kuasa untuk mengenakan syarat-syarat di dalam bon jaminan. Seksyen 390 KTJ jelas memperuntukkan bahawa kuasa untuk melepaskan seseorang atas jaminan adalah diberi kepada mahkamah dan pegawai polis sesuatu balai polis. Oleh itu, jika seorang tertuduh dibenarkan dijamin oleh seorang pegawai suatu balai

polis, pegawai tersebut boleh meminta supaya tertuduh melaksanakan bon dengan seorang atau lebih penjamin bagi mengikatnya untuk menghadirkan diri di hadapan pegawai tersebut di balai polis dari masa ke semasa.

(5) Permohonan yang dibuat oleh pegawai pendakwa di mahkamah majistret bukan untuk melanjutkan tahanan di bawah s. 117 KTJ tetapi untuk suatu perintah supaya suspek-suspek dilepaskan atas jaminan polis sementara menunggu penyiasatan polis selesai. Oleh kerana majistret tidak merekodkan sama ada permohonan dibenarkan, permohonan dianggap sebagai ditolak. Pegawai pendakwa tidak boleh mengandaikan permohonan sebagai dibenarkan. Kekeliruan ini bukan disebabkan oleh kesilapan plaintif dan oleh itu manfaat kekeliruan harus diberikan kepada plaintif, iaitu bahawa permohonan adalah ditolak. Sebaik permohonan ditolak, defendan pertama tidak lagi boleh mengeluarkan jaminan polis di bawah s. 388(1) KTJ. Dengan membuat plaintif menandatangani bon jaminan polis dan mengenakan syarat-syarat di situ, perbuatan tersebut adalah melanggari perintah mahkamah dan tidak sah.

(6) Walaupun polis mempunyai kuasa untuk mengenakan jaminan di bawah s. 388 KTJ jikapun tertuduh dilepaskan dari tahanan di bawah s. 117 Kanun tersebut, kuasa itu tidak harus disalahgunakan, seperti halnya dengan kes di sini, di mana tertuduh berkali-kali diminta menghadirkan dirinya di balai polis cuma untuk borang jaminannya diendorskan supaya beliau kembali semula pada tarikh yang lain. Fakta menunjukkan bahawa pihak polis tidak secara jujur menyambung dengan penyiasatan kes yang mana ia adalah suatu penyalahgunaan kuasa. Plaintif telah dinafikan kebebasan dirinya secara yang melanggari fasal 5(1) Perlembagaan sekaligus membangkitkan tuntutan untuk gantirugi.

[Soalan 1 & 2 dijawab secara positif; Soalan 3 dijawab melalui alasan-alasan yang terserlah dalam Keputusan 5 dan Keputusan 6.]

Case(s) referred to:

In Re The Detention of S Sivarasa & Ors [1997] 1 CLJ 471 HC ***(refd)***
Kimat Rai Sanwal Singh v. Emperor [1946] 47 Cr LJ 155 ***(refd)***
PP v. Audrey Keong Mei Cheng [1997] 4 CLJ 702 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 28, 29, 117, 387, 388(1), 390
Federal Constitution, arts. 5(1), (4)
Penal Code, s. 454
Rules of the High Court 1980, O. 14A

Criminal Procedure Code [Ind], s. 499

For the appellants/defendants - Dato' Kamaludin Md Said; AG's Chambers
For the respondent/plaintiff - David Fung; M/s Alex Pang & Co

[Appeal from Court of Appeal, Civil Appeal No: S-01-180-2008]

Reported by Usha Thiagarajah

JUDGMENT

Raus Sharif FCJ:

Introduction

[1] This is an appeal by the appellants against the decision of the Court of Appeal on 10 December 2010, affirming the decision of the learned Judicial Commissioner of the High Court Sandakan ("the trial judge"). The trial judge had allowed the respondent's claim by way of an application on a point of law under O. 14A of the Rules of the High Court 1980 ("RHC 1980").

[2] Leave to appeal was granted by this Court on 21 March 2011 on the following questions:

Question 1

Whether it is lawful for the police to release a suspect on police bail under s. 388 of the Criminal Procedure Code after the said suspect has been released from a remand order by a magistrate under s. 117 of the same Code.

Question 2

Whether it is lawful to impose a condition in the bail bond that the suspect has to appear and report at a police station on a fixed date and whether the said condition can be extended from the time to time for so long as the case against the suspect is still under police investigation.

A **Question 3**

If either or both the police bail described above is unlawful, whether it amounts to a deprivation of the suspect's personal liberty in contravention of art. 5(1) of the Federal Constitution giving rise to a claim for damages.

B

[3] For convenience, the parties will be referred to as plaintiff and defendants as in the trial court.

The Facts

C

[4] The facts of this case is well narrated by the trial judge which are as follows:

4.1 On 3 January 2000, the plaintiff and one Mr Lai were arrested without a warrant on suspicion of committing an offence of house-trespass or house-breaking under s. 454 of the Penal Code. The arrest was based on a complaint lodged at the Sandakan Police Station by one Ali Latip Taha ("the tenant of the plaintiff").

D

E

4.2 On 4 January 2000, both the suspects were brought before the Magistrate at Sandakan. On application by the 1st defendant, they were remanded for three days under s. 117 of the Criminal Procedure Code ("CPC").

F

4.3 On 6 January 2000, Chief Inspector, Choo Peng Yeang applied to the Magistrate for an order to release the plaintiff and Mr. Lai on police bail pending completion of police investigation. The Magistrate ordered both of them to be released. The Magistrate wrote in her notes of proceeding: "Both suspects to be released".

G

4.4 On the same day, ie, immediately after the Magistrate had given the order, the police officer brought the plaintiff and Mr Lai to Sandakan Police Station. They were made to sign separate bail bonds issued by the 1st defendant for an undeposited sum of RM10,000 in two sureties each. Under the police bail bond, the plaintiff had to appear before the 1st defendant at Sandakan Police Station on 28 January 2000.

H

I

4.5 On 28 January 2000, when the plaintiff appeared at the Sandakan Police Station, the 1st defendant endorsed the bail form and extended the bail until 28 March 2000. The process was repeated at about monthly intervals right through 5 October 2000.

4.6 In the interim period, the plaintiff wrote to the Federal Attorney General's Chambers to enquire about the decision concerning the complaint against him, emphasizing that the whole matter was still hanging over him and that he had to report to the Sandakan Police Station almost every month. The first letter was written on 11 May 2000, followed by letters of reminder dated 26 June 2000, 15 July 2000 and 1 September 2000 respectively.

4.7 On 11 October 2000, the Federal Attorney General's Chambers finally wrote to inform the plaintiff that after careful and comprehensive study of the case, they have decided to close the investigation and to withdraw the police bail against him.

[5] The plaintiff, unhappy with what had happened to him, filed a writ action against the defendants. Subsequently, by way of originating summons under O. 14A of RHC, the plaintiff applied for the agreed issues for trial to be disposed by determining same three questions of law referred to us.

[6] On 24 October 2008, the trial judge decided on all the three questions in favour of the plaintiff. It was declared that the issuance of the police bail dated 6 January 2000 by the 1st defendant against the plaintiff on the terms stated therein was a deprivation of the plaintiff's personal liberty and in contravention of art. 5(1) of the Federal Constitution. The trial judge then ordered compensation to be paid by the 1st, 2nd, 3rd, 4th and 5th defendants jointly and severally to the plaintiff. It was subsequently assessed by the Deputy Registrar and the sum awarded was RM3,000.

[7] As stated earlier, the three questions that were determined by the trial judge and affirmed by the Court of Appeal are essentially the same questions posed to this court. I will deal with the three questions in turn.

A

Question 1

Whether it is lawful for the police to release a suspect on police bail under s. 388 of the CPC after the said suspect has been released from the remand order by a magistrate under s. 117 of the same Code.

B

[8] The trial judge answered Question 1 in the negative. The trial judge held that it is unlawful for the police to issue a police bail against the plaintiff who has been released by an order of the Magistrate under s. 117 of the CPC. The trial judge was of the view that the power of the police officer to release any person accused of a non-bailable offence under s. 388(1) of the CPC is only exercisable before the accused is produced before a Magistrate under s. 117 of the CPC.

C

D

[9] Before dealing further with the matter it would be convenient to reproduce s. 117 (at the material time) and s. 388 of the CPC:

E

117 (1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall immediately transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate.

F

(2) The Magistrate before whom an accused person is produced under this section may, whether he has or has no jurisdiction to try the case, from time to time authorize the detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding fifteen days in the whole. If he has no jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a Magistrate having such jurisdiction or, if the case is triable only by the High Court, before himself or another Magistrate having jurisdiction with a view to transmission for trial by the High Court.

G

H

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for doing so.

I

388 (1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by that Court, but he

shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or at the discretion of that officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

[10] It is significant to note that s. 117 of the CPC relates to a detention of the accused person after arrest, while s. 388 of the CPC relates to the release of the accused person after arrest. Under s. 117 of the CPC, a Magistrate on the application by the police may authorise the detention of the accused person in the police custody from time to time for a term not exceeding fifteen days in the whole. Section 117 of the CPC is in my view derived from art. 5 of the Federal Constitution and s. 28 of the CPC.

[11] Article 5(1) of the Federal Constitution states that no person is to be deprived of his personal liberty save in accordance with law. Obviously, when a person is arrested, he is being deprived of his personal liberty. For that reason, art. 5(4) provides that where a person is arrested and not released, he needs to be produced before a Magistrate within twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate.

[12] Section 28 of the CPC, specifically deals with a situation where a person is arrested without a warrant. The section reads as follows:

28(1) A police officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions herein as to bail or previous release, take or send the person arrested before a magistrate.

(2) No police officer shall detain in custody a person arrested without a warrant for a longer period than under all circumstances of the case is reasonable.

A (3) Such period shall not in the absence or after the expiry of a special order of a Magistrate under section 117 exceed twenty-four hours exclusive of the time necessary for the journey from the place of the arrest to the Magistrate.

B **[13]** Thus, under the scheme of art. 5(4) of the Federal Constitution and s. 28 of the CPC, the maximum period for a person arrested without a warrant can be detained by the police in the absence of a special order of a Magistrate under s. 117 of the CPC is twenty-four hours excluding the time requisite for the journey from the place of arrest to the Magistrate.

C **[14]** Under the old s. 117 of the CPC, the Magistrate has the discretion to fix the number of days as he thinks fit as long as it does not exceed fifteen days in whole. However, the present s. 117 of the CPC limits the discretion to the following:

D (i) if the offence which is investigated is punishable with imprisonment of less than fourteen years, the detention shall not be more than four days on the first application and shall not be more than three days on the second application;

E (ii) if the offence which is being investigated is punishable with death or imprisonment of fourteen years or more, the detention shall not be more than seven days on the first application and shall not be more than seven days on the second application.

F **[15]** Whatever the limitation imposed by the present s. 117 of the CPC, the purpose remains the same ie, giving the Magistrate the power to detain the accused person in the custody of the police for the purpose of the police investigation. The workings of G s. 117 of the CPC is well settled (see *In Re The Detention of S Sivarasa & Ors* [1997] 1 CLJ 471; *PP v. Audrey Keong Mei Cheng* [1997] 4 CLJ 702).

[16] It should be noted that s. 117 of the CPC makes no H mention of a Magistrate having the power to release an accused person on bail. The provisions relating to the release of an accused person after arrest on bail are found in s. 29, s. 387 and s. 388 of the CPC.

I

[17] Section 29 of the CPC is the general provision which emphasizes that upon the accused person being arrested by a police officer he can only be released on his own bond or under an order in writing of a Magistrate or a police officer not below the rank of Inspector. Section 387 of the CPC relates to a specific provision whereby an accused person may be released on bond or bail in a bailable offence. It is clearly provides that if the arrested person is prepared to give bail, he must be released on bail either by the officer in charge of the police station where he is under arrest or detention or by the court before whom he appears or is produced.

[18] Section 388 of the CPC is the other specific provision relating to bail. It relates to a non-bailable offence ie, where an accused person is arrested without a warrant. In the present case, the applicable section is s. 388 of the CPC as the plaintiff was arrested without a warrant by the police officer on suspicion or accused of committing of house-trespass or house-breaking, which is a non-bailable offence.

[19] The learned Senior Federal Counsel for all the defendants submitted that the trial judge was wrong to restrict the power of the police officer to release the plaintiff on bail to only before the plaintiff was produced before a Magistrate under s. 117 of the CPC. According to him, such power was still exercisable even after the plaintiff was released from detention under s. 117 of the CPC.

[20] The learned counsel for the plaintiff took the opposite view. He endorsed the view of the trial judge and submitted that once the Magistrate had ordered the plaintiff to be released following the detention order under s. 117 of the CPC, with no condition of release being imposed, the 1st defendant ought not have issued a police bail against the plaintiff.

[21] It is significant to note at this juncture that the trial judge had rightly ruled that the power to grant bail under s. 388 as in s 387 and s. 29 of the CPC is given both to the police officer as well as the court. The complaint by learned Senior Federal Counsel is limited to the trial judge's ruling that it is unlawful for the police to issue a police bail against the plaintiff who had been released by an order of a Magistrate. The Senior Federal Counsel argued that the trial judge was in error when he imposed such limitation on the police.

[22] To me, there is strong basis for the complaint. This is because there is nowhere in s. 388 of the CPC which limits the power of the police officer to issue police bail only before the accused person is detained under s. 117 of the CPC. It is my view that s. 117 of the CPC is a specific provision relating to a detention of an accused person by a Magistrate for the purpose of police investigation. The section makes no mention of the Magistrate having the power to grant bail. Section 117 of the CPC operates independently of s. 388 of the CPC. In essence, s. 117 and s. 388 of the CPC deal with two separate situations. As stated earlier, s. 117 of the CPC deals with detention of an accused person after arrest while s. 388 of the CPC deals with the release of an accused person after arrest.

[23] It is to be noted that the Magistrate's power under s. 117 of the CPC is either to detain the accused person or to refuse the detention. The question that comes to mind is what happens if the Magistrate refuses to grant the detention or to further extend the detention of an accused person. Obviously, under such circumstances, the police has no choice but to release the accused person. But, it is my respectful view that the release of the accused person under s. 117 of the CPC cannot be equated as an order to acquit and discharge the accused person from the criminal accusation.

[24] Thus, in the present case, the plaintiff and Mr Lai at the end of the three days detention period were brought before the Magistrate's Court. The prosecuting officer then applied for the plaintiff and Mr Lai to be released on police bail pending completion of the police investigation. Unfortunately, the Magistrate gave no indication as to whether the application to release both of them on police bail was allowed or otherwise. Instead what was recorded by the Magistrate was: "Both suspects to be released".

[25] I am of the view that the release order of the plaintiff and Mr Lai in this case, has to be in relation to their detention under s. 117. They cannot be said to have been acquitted and discharged of the criminal accusation and the police cannot be prevented from continuing with the investigation against both of them.

[26] It usually occurs that investigation could not be completed within the detention period granted by the Magistrate under s. 117 of the CPC. Section 388 of the CPC is there to assist the police. It empowers the police to release the accused person on police bail, while the investigation is still in progress. Thus, it is my respectful view that the trial judge had erred in deciding that the power of the police officer to release any person accused of a non-bailable offence under s. 388(1) of the CPC is only exercisable before the accused person is produced before a Magistrate under s. 117 of the CPC. Section 388 of the CPC makes no such provision. Neither does such a provision under s. 117 of the CPC exist. Thus, to uphold the decision of the trial judge on this issue will have the effect of defeating the intent and purpose of s. 388 of the CPC.

[27] Based on the above reasoning, it is my view that Question 1 should be answered in the positive. It means that it is lawful for the police to issue a police bail under s. 388(1) of the CPC against the accused person who has been released by a Magistrate after a detention under s. 117 of the CPC.

Question 2

Whether it is lawful to impose a condition in the bail bond that the suspect has to appear and report at a police station on a fixed date and whether the said condition can be extended from the time to time for so long as the case against the suspect is still under police investigation.

[28] Having answered Question 1 in the positive, my answer to Question 2 is also in the positive. The police having the power to grant a police bail must necessarily have the power to impose conditions in the bail bond that the accused person has to appear and report at a police station on a fixed date and the said conditions can be extended from time to time for so long as the case against the accused person is still under police investigation. This is clearly provided by s. 390 of the CPC which reads:

> 390(1) Before any person is release on bail, or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by that person, and when he is released on bail by one or more sufficient sureties, conditioned that person shall attend at the time and placed mentioned in the bond, and shall continue attend until otherwise directed by the police officer or court, as the case may be.

A (2) If the case so require the bond shall also bind the person released on bail to appear when called upon at the High Court or other Court to answer the charge.

[29] The section uses the words "the police officer or court" and "as the case may be" and this clearly indicate that the power to B release a person on bail is given to the court as well as to the police officer. Thus, if an accused person is admitted to bail by an officer of a police station, the officer can require him to execute a bond with one or more sureties binding him to appear before the officer at the police station from time to time. C

[30] In India, the court in the case of *Kimat Rai Sanwal Singh v. Emperor* [1946] 47 Cr. LJ 155, in interpreting s. 499 of the Indian CPC, which is in *pari materia* to our s. 390 of the CPC, held as follows:

D The words of s. 499 are wide enough to include a police station or police officer among the places which an accused person executing a bail bond may be required to attend. The section does not in express terms say that the accused can only be required to attend a court … E

[31] The learned trial judge in the said case also held that:

Section 499 of the Code provides that before any person is released on bail, a bond with one or more sufficient sureties shall be executed by him binding himself to attend at the time and F place mentioned in the bond. It is therefore clear that if an accused person is admitted to bail by an officer in charge of a police station, the officer can require him to execute a bond with one or more sureties binding him to appear before himself or before a court.

G **[32]** I hold the same view in interpreting s. 390 of the CPC. It is my view that it is permissible for a police officer to issue a police bail by imposing conditions in the bail bond that an accused person has to appear and report at a police station on a fixed H date. The said conditions can be extended from time to time for as long as the case against the accused person is still under police investigation.

Question 3

I If either or both of the use of the police bail described above is unlawful, whether it amounts to a deprivation of the suspect's personal liberty in contravention of art. 5(1) of the Federal Constitution giving rise to a claim for damages.

[33] Having answered Question 1 and Question 2 in the positive, it does not necessary follow that the defendants are not liable for what they did against the plaintiff. On the facts of this case, I do not think the 1st defendant was right in making the plaintiff to sign the police bail bond after being released by the Magistrate's Court.

[34] It must be noted that it is the Magistrate's Court that has the power to grant bail and not a Magistrate while exercising his power under s. 117 of the CPC. As stated earlier, s. 117 of the CPC makes no mention of a Magistrate having power to grant bail. Further there is no requirement for a police officer at the expiry of the remand period to bring back the accused before the Magistrate for his release. But, in the present case, for reasons best known to the police, the plaintiff as well as Mr Lai at the expiry of the three days detention was brought by the prosecuting officer before a Magistrate's Court. The prosecuting officer's application before the Magistrate's Court was not for further detention under s. 117 but for an order that the plaintiff and Mr Lai be released on police bail pending completion of police investigation. It is rather unfortunate in this case that the Magistrate did not record whether the application by the prosecuting officer for the plaintiff and Mr Lai be released on police bail bond was granted or not.

[35] On this issue, I agree with learned counsel for the plaintiff. It can be assumed that the application for the plaintiff and Mr Lai to be released on police bail was rejected by the Magistrate's Court. Thus, once the Magistrate's Court had rejected the application, the 1st defendant could no longer issue the police bail, purportedly exercising his power under s. 388(1) of the CPC.

[36] No doubt in the present case, there was no clear order by the court whether the application for the plaintiff and Mr Lai to be released on police bail was granted or not. However, in the absence of a clear order by the court, the prosecuting officer cannot assume that such an order was actually made. When there was such confusion, and it was not due to the fault of the plaintiff, the benefit of the confusion must be given to the plaintiff ie, that the application by the prosecuting officer was in fact rejected by the court.

[37] Therefore, while the police may have powers to impose bail under s. 388 of the CPC even though the accused has been released from remand under s. 117 of the CPC, this power must not be abused as in this case where the accused was repeatedly required to present himself at the police station only to have his bail form endorsed for him to appear on another date. On the facts of this case the police are obviously not honestly continuing with the investigation into the case. To me that is an abuse of power.

[38] Thus, I would answer the 3rd Question in the following manner. The police officer after failing to get the order of the Magistrate's Court to release the plaintiff on bail, could no longer exercise his power under s. 388(1) of the CPC by making the plaintiff to sign a police bail bond and impose conditions thereon. Such an act is in defiance of the court's order. The act was unlawful and it amounts to a deprivation of the plaintiff's personal liberty in contravention of art. 5(1) of the Federal Constitution giving rise to a claim for damages.

[39] My learned brothers Zaki Tun Azmi CJ and Zulkefli Ahmad Makinudin FCJ have read through this judgment in draft. I have incorporated their comments for which I am grateful. They have expressed their agreements to the final draft.

[40] Accordingly, for the foregoing reasons the appeal is dismissed with costs.